

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF IOWA  
CENTRAL DIVISION**

BRADLEY L. WINTERS,

Petitioner,

vs.

STATE OF IOWA, sub nomine IOWA  
DEPARTMENT OF CORRECTIONS,

Respondent.

No. C 99-3094-MWB

**ORDER REGARDING MAGISTRATE  
JUDGE'S REPORT AND  
RECOMMENDATION**

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This action for *habeas corpus* relief pursuant to 28 U.S.C. § 2254 comes before the court pursuant to the Report and Recommendation filed in this matter on June 28, 2001, by Magistrate Judge Paul A. Zoss. Judge Zoss recommends that relief be denied on the petitioner's only exhausted claim, a claim that his trial counsel was ineffective in failing to challenge the constitutionality of a search incident to citation pursuant to IOWA CODE § 805.1(4). In a unanimous decision, the United States Supreme Court subsequently found IOWA CODE § 805.1(4) unconstitutional. *See Knowles v. Iowa*, 525 U.S. 113 (1998). Judge Zoss nevertheless found that Winters cannot demonstrate the requirements for relief on a claim of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984)—that is, that the decision of the Iowa Court of Appeals in this regard was neither contrary to controlling precedent of the United States Supreme Court nor an unreasonable application of such precedent. *See* 28 U.S.C. § 2254(d). However, Judge Zoss recommends that a certificate of appealability issue, on the ground that the Supreme Court might hold that its declaration that IOWA CODE § 805.1(4) is unconstitutional has retroactive application to cases on collateral review. No timely objections to Judge Zoss's Report and Recommendation have been filed.

The standard of review to be applied by the district court to a report and recommendation of a magistrate judge is established by statute:

A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate [judge].

28 U.S.C. § 636(b)(1). The Eighth Circuit Court of Appeals has repeatedly held that it is reversible error for the district court to fail to conduct a *de novo* review of a magistrate judge's report where such review is required. *See, e.g., Hosna v. Goose*, 80 F.3d 298, 306 (8th Cir.) (citing 28 U.S.C. § 636(b)(1)), *cert. denied*, 519 U.S. 860 (1996); *Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (citing *Belk v. Purkett*, 15 F.3d 803, 815 (8th Cir. 1994)); *Hudson v. Gammon*, 46 F.3d 785, 786 (8th Cir. 1995) (also citing *Belk*). However, the plain language of the statute governing review provides only for *de novo* review of "those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). Therefore, portions of the proposed findings or recommendations to which no objections are filed are reviewed only for "plain error." *See Griffini v. Mitchell*, 31 F.3d 690, 692 (8th Cir. 1994) (reviewing factual findings for "plain error" where no objections to the magistrate judge's report were filed).

Because no timely objections have been filed in this case, the court will review Judge Zoss's Report and Recommendation only for "plain error." *Id.* Upon such review, the court finds no "plain error," and so will accept Judge Zoss's Report and Recommendation in its entirety.

THEREFORE,

1. Judge Zoss's June 28, 2001, Report and Recommendation in this matter is **accepted** in its entirety.
2. Winter's petition for *habeas corpus* relief pursuant to 28 U.S.C. § 2254 is

**denied.** Judgment in favor of the respondent shall enter accordingly.

3. A certificate of appealability pursuant to 28 U.S.C. § 2253(c) is **granted** on the question of the retroactive application of *Knowles v. Iowa*, 525 U.S. 113 (1998), which declared IOWA CODE § 805.1(4) unconstitutional, to cases on collateral review.

**IT IS SO ORDERED.**

**DATED** this 1st day of August, 2001.

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MARK W. BENNETT  
CHIEF JUDGE, U. S. DISTRICT COURT  
NORTHERN DISTRICT OF IOWA